79-5103

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 190-E

ROBERT CAREY, Appellant

v.

NEW YORK STATE HUMAN RIGHTS APPEAL BOARD, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE and NEW YORK STATE DIVISION OF HUMAN RIGHTS, Appellees

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SUPREME COURT, U.S.

APPEAL FROM NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

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Pursuant to Rules 13(2) and 15 of the Rules of the SUPREME COURT OF THE UNITED STATES, Appellant, ROBERT CAREY, files this statement on the basis upon which it is contended that the SUPREME COURT OF THE UNITED STATES has jurisdiction to review the judgment entered by the NEW YORK COURT OF APPEALS in this case and should exercise such jurisdiction herein.

QUESTIONS PRESENTED

1. Does Civil Service Law §50(7), violate the Fourteenth Amendment to the Federal Constitution.

A. Is sex a bona fide occupational qualification which permits discrimination for employment as a Correction Office in female correctional facilities.

OPINIONS BELOW

The opinion of the New York Court of Appeals which appears in the April 6, 1979, New York Law Journal, affirmed the decision of the Appellate Division cited in 61 A.D. 2d 804, 402 N.Y.S. 2d 207 (1978) which confirmed the order of the State Human Rights Appeals Board, Case No. GCS-40462-75, appeal No. 3363, which affirmed the determination of the New York State Division of Human Rights Case No. IV, GCS-1327-75, GCS-404-62-75, which dismissed appellant's complaint charging the New York State Department of Civil Service with unlawful discriminatory practice relating to employment because of sex [said opinions are included herein as Appendix A-D (pp.11-18)

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action charging the New York State Department of Civil Service with unlawful sexual discrimination. The judgment of the New York Court of Appeals was entered on April 5, 1979. A timely Notice of Appeal was filed on May 3, 1979 in the New York Court of Appeals. The jurisdiction of this Court is invoked under title 28 U.S.C. §1257(2).

The appellant challanges the constitutionality of the New York State Civil Service Law §50.7 (McKinney's, 1958).

> "Limitation of eligibility to one sex, the State Civil Service Department or the municipal commission having jurisdiction, may limit eligibility for examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex, or visitation, inspection or work of any kind, the nature of which requires sex selection."

Where the constitutionality of a State statute or authority exercised under any State was properly raised in State Court, as was done in the present case, the Supreme Court has jurisdiction to re-examine the final judgment, New York, N.H. & H.R. & Co. v. New York, 165 U.S. 628, 17 S. Ct. 418, 41 LE.D 853 (1897).

Furthermore, the disapproval by the New York Department of Civil Service, (hereinafter Civil Service), of Robert Carey's application for Correction Officers Examination No. 24-330, on the grounds that said examination was limited to females is State law within the Constitution of the United States which when upheld by the highest Court of the State may be reviewed by the Supreme Court. See, Lake Erie and W.R. Co. v. State Public Utilities Comp.,

249 U.S. 422, 39 S.Ct. 345, 63 LE.D. 684 (1919), Sultan R. and T. Co. v. Department of Labor and Industries, 277 U.S., 135, 48 S.Ct. 505, 72 LE.D. 820 (1928).

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows; In November, 1975 appellant, Robert Carey filed an application for Correction Officer's Examination No. 24-330. This application was disapproved by the New York State Department of Civil Service on the ground that pursuant to Civil Service Law §50(7), Examination No. 24-330 was limited to females.

A complaint was filed with the New York Division of Human Rights alleging unlawful sexual discrimination which alleged that the Civil Service violated the New York human rights law, Executive Law §296, by unlawfully discriminating against appellant on the basis of sex.

The Division of Human Rights issued a "Determination and Order After Investigation" stating that the Civil Service had engaged in no discriminatory practices, basing their decision on Civil Service Law §50(7).

An appeal was taken to the New York State Human Rights Appeal Board, which sustained by an unspecified majority, the decision of the Division of Human Rights, holding the decision not to be arbitrary, capricious or an abuse of discretion.

Appellant thereafter, filed an appeal with the Appellate Division Second Department. The Appellate Division unanimously confirmed the decision of the Appeal Board and dismissed the appellant's cause of action. The Appellate Division in its opinion 61, A.D. 2d 804, 402 N.Y.S. 2d 207 (1978) stated the follows:

> "The petitioner in his brief, attacks the constitutionality of that provision (Civil Service Law §50(7), on the grounds that it violates the equal protection

clause of the Fourteenth Amendment to the Federal Constitution. Hence, the determination of the basic substantive issue may involve a resolution on the issie of constitutionality, especially since petitioner and the respondent, the Appeal Board and the Department of Civil Service agree in their respective briefs that §50(7) of the Civil Service law is a restatement of §296 (subd. 1, par.[d]), of the Executive Law, which provides that a "bona fide occupational qualification" is an exception to the ban on the use by an employer or employment agency in any application for employment, of language which expresses any limitation or specification as to sex. Thus the issue of the constitutionality of the provision of the Civil Service law here under attack, turns on whether the limitation of eligibility for admission to the examination for the position of correction officer based on sex is a valid occupational qualification." [Emphasis added]

The Court decided the issue of bona fide occupational qualification based on "its own judicial common sense."

An appeal was filed with the New York Court of Appeals which unanimously affirmed the Appellate Division's decision, for reasons stated in the Appellate Division's Memorandum.

FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal sets forth important and substantial questions as hereinafter described, in that Robert Carey was denied employment as a correction officer on the basis of his sex.

There is a right to employment without discrimination on the basis of sex, unless there is a bona fide occupational qualification. Dothard v. Rawlinson, 97 S.Ct. 2720 (1977). There has been no documentary evidence produced that substantially all males are unfit to be correction officers, and mere sterotyped characterizations of the sexes may not be used to justify the exclusion of appellant from his livelihood. Phillips v. Martin Marietta Corp. 400 U.S. 542 (1971) Indeed in Forts v. Ward, 434 F. Supp. 946 (S.D.N.Y. 1977). The Court allowed the State to assign male guards in female prisons.

The right to employment is a vital interest Truax v. Raich, 239 U.S. 33 (1915). Such an interest should not be set aside if the State as in Forts v. Ward, supra may establish differentiated work schedules so that the prisioner's right to privacy is protected.

CONCLUSION.

For the reasons stated above, appellant submits that this appeal brings before this Court substantial questions which require plenary consideration with briefs and oral argument for their resolution.

Dated: New York, N. Y.
May 31, 1979

Respectfully submitted,

ROBERT D. ARENSTEIN, ESQ.
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APPENDIX A

Opinion of New York State Division of Human Rights
(Copy of Decision)

APPENDIX B

Opinion of New York State Human Rights Appeal Board
(Copy of Decision)

APPENDIX C

61 A.D. 2d 804, 402 N.Y.S. 2d 207
(2d dept., 1978)
(Copy of Decision)

APPENDIX D

Opinion of New York Court of Appeals
(Copy of Decision)

APPENDIX E

Notice of Appeal

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 14, 1978.

HON. JOSEPH A. SUOZZI, Justice Presiding,
HON. FRANK A. GULOTTA,
HON. CHARLES MARGETT,
HON. JOSEPH F. HAWKINS. } *Associate Justices*

Robert Carey,

Petitioner,

v.

New York State Human Rights Appeal Board et al.,

Respondents.

Order

A proceeding having been instituted in this court under section 298 of the Executive Law, by petition of Robert Carey, verified April 26, 1977, to review an order of the State Human Rights Appeal Board, dated March 30, 1977, which affirmed a determination of the State Division of Human Rights, dated February 26, 1976, which, after an investigation, dismissed petitioner's complaint charging the New York State Department of Civil Service with an unlawful discriminatory practice relating to employment because of sex; the respondents New York State Human Rights Appeal Board and New York State Department of Civil Service having filed an answer thereto;

Now, upon the said petition, the brief of the petitioner; the said answer, dated October 31, 1977, the brief of the respondents New York State Human Rights Appeal Board and New York State Department of Civil Service and petitioner's reply brief; and upon all the papers filed herein; and the proceeding having been argued by Arthur F. Woodward, Esq., of counsel for the petitioner and argued by Judith T. Kramer, Esq., of counsel for the respondents New York State Human Rights Appeal Board and New York State Department of Civil Service, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the said order is hereby confirmed and the proceeding dismissed, without costs or disbursements.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division.

APPELLATE DIVISION SUPREME COURT
STATE OF NEW YORK

I, IRVING N. SELKIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that the foregoing paper is a true copy with the original filed in my office on 3/14/78 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on 3/2/78

Irving N. Selkin

STATE HUMAN RIGHTS APPEAL BOARD

ROBERT CAREY, COMPLAINANT-APPELLANT

vs.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
RESPONDENT

ORDER

Case No. GCS-40462-75

Appeal No. 3363

The above-entitled appeal having been filed with this Board on the 3rd day of March, 1976 by Complainant-Appellant and having come on to be heard before Honorable Tibby Blum on the 26th day of August, 1976, and Complainant-Appellant, Robert Carey having appeared, argued and submitted a brief on his own behalf, and Respondents, having appeared by Harvey Randall, Esq., who submitted a brief on behalf of Respondent, and the State Division of Human Rights having appeared by Beverly Gross, Esq., General Counsel, Gladys M. Foster, Esq., Senior Attorney, of Counsel, who submitted on the record, and

The Board having reviewed the record herein and having considered the argument of the Complainant-Appellant and the briefs of the parties and a majority of the Board having decided that the Order appealed from herein is not arbitrary, capricious or an abuse of discretion, it is

ORDERED, that the Determination and Order of the State Division of Human Rights made herein on the 26th day of February, 1976 be, and the same hereby is in all respects affirmed.

Dated: March 30, 1977
Mailed: March 30, 1977

STATE HUMAN RIGHTS APPEAL BOARD

Irma Vidal Santaella

Irma Vidal Santaella, Chairman

TO: (See attached list)

The complaint is therefore ordered dismissed and the file is closed.

THE COMPLAINANT OR ANY PARTY TO THE PROCEEDING BEFORE THE DIVISION MAY APPEAL THIS ORDER TO THE STATE HUMAN RIGHTS APPEAL BOARD AT 2 WORLD TRADE CENTER, 82ND FLOOR, NEW YORK, N.Y. 10047, BY FILING A NOTICE OF APPEAL WITHIN FIFTEEN (15) DAYS AFTER THE DATE OF SERVICE OF THIS ORDER.

Dated: February 26, 1976

STATE DIVISION OF HUMAN RIGHTS

By John W. Walker Jr
John W. Walker, Jr.
Regional Director

TO:

Robert Carey, Complainant
100-12 199th Street
Hollis, New York 11423

New York State Department
of Civil Service, Respondent
Joseph R. Healy, Esq.
Attorney for Respondent
State Office Building Campus
Albany, New York 12239

NEW YORK STATE : EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

COMPLAINANT

ROBERT CAREY

VS.

Case No. IV-GCS-1327-75
GCS-40462-75

NEW YORK STATE DEPARTMENT
OF CIVIL SERVICE

RESPONDENT

DETERMINATION AND ORDER AFTER INVESTIGATION

On December 2, 1975, Robert Carey, who is male, filed a verified complaint with the State Division of Human Rights charging the above-named respondent with an unlawful discriminatory practice relating to employment because of his sex, in violation of the Human Rights Law of the State of New York.

After investigation, review of related information and evidence, and having given all parties full opportunity for discussion, the Division of Human Rights hereby determines that there is no probable cause to believe that the respondent engaged in or was engaging in the unlawful discriminatory practice complained of.

This determination is based on the following: Civil Service Law regarding recruitment of personnel, Section 50.7 states: "Limitation of eligibility to one sex. The state civil service department or the municipal commission having jurisdiction may limit eligibility for examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex, or visitation, inspection or work of any kind the nature of which requires sex selection."

Evidence in the record also indicates that separate announcements are issued for each sex to facilitate job analysis; recruitment relative to differing needs in male or female correctional institutions and administration of eligibility lists and appointments.

An examination for Correction Officer (male) was held in January, 1975 in Region VII, the region in which the complainant resides.

ROBERT CAREY, Appellant,
v.
NEW YORK STATE HUMAN RIGHTS
APPEAL BOARD, et. al., Respondents.

Court of Appeals of New York
April 5, 1979

Now appears in 46 N.Y.S.2d 1968,
(416 N.Y.S.2d 794 (1979))

No. 121

Robert Carey, Appellant,
vs.
New York State Human Rights
Appeal Board, et al.,
Respondents.

Order affirmed, with costs, for the reasons stated in the memorandum at the Appellate Division (61 A D 2d 804). Concur: Cooke, Ch.J., Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

B/mc

AD2d

A- January 31, 1978.

190 E

Robert Carey, petitioner,
v. New York State Human Rights
Appeal Board et al., respondents.

Robert D. Arenstein and Arthur F. Woodard, New York, N.Y., for petitioner.

Louis J. Lefkowitz, Attorney-General, New York, N.Y. (Judith T. Kramer and Samuel A. Hirshowitz, of counsel; Richard Maltz, on the brief), for respondents New York State Human Rights Appeal Board and New York State Department of Civil Service.

Proceeding pursuant to section 298 of the Executive Law to review an order of the State Human Rights Appeal Board, dated March 30, 1977, which affirmed a determination of the State Division of Human Rights, dated February 26, 1976, which, after an investigation, dismissed petitioner's complaint charging the New York State Department of Civil Service with an unlawful discriminatory practice relating to employment because of sex.

Order confirmed and proceeding dismissed, without costs or disbursements.

The substantive issue on which this proceeding turns is whether the action of the respondent Department of Civil Service, in rejecting petitioner's application to take an examination for the position of correction officer (female), scheduled for December 13, 1975, on the ground that the examination was open to females only, constituted a violation of the provisions of section 296 of the Executive Law barring discrimination in employment based on sex. Since the determination of the division dismissing petitioner's complaint was based, in part, on section 50 (subd. 7) of the Civil Service Law, which authorizes the State Department of Civil Service to "limit eligibility for examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex, or visitation, inspection or work of any kind the nature of which requires sex selection", the petitioner, in his brief, attacks the constitutionality of that provision on the ground that it violates the equal protection clause of the

Fourteenth Amendment to the Federal Constitution. Hence, the determination of the basic substantive issue may involve a resolution of the issue of constitutionality, especially since petitioner and the respondents, the Appeal Board and the Department of Civil Service, agree in their respective briefs that section 50 (subd. 7) of the Civil Service Law is a restatement of section 296 (subd. 1, par [d]) of the Executive Law, which provides that a "bona fide occupational qualification" is an exception to the ban o the use by an employer or employment agency, in any application for employment, of language which expresses any limitation or specification as to sex. Thus the issue of the constitutionality of the provision of the Civil Service Law here under attack turns on whether the limitation of eligibility for admission to the examination for the position of correction officer based on sex is a valid occupational qualification.

Petitioner also claims that the order under review does not meet the standard of section 298 of the Executive Law, which provides that the findings of fact on which an order of the Appeal Board is based "shall be conclusive if supported by sufficient evidence on the record considered as a whole."

With respect to the key issue of whether sex is a bona fide occupational qualification for the position of correction officer, our examination of the record and our own judicial common sense makes it clear that the qualification is required. We are here concerned with persons who are serving terms of imprisonment in correctional facilities in which they are segregated by sex and must be confined under observation and guard at all times; both the needs of the correctional facilities to maintain security by such means as body searches and the needs of the inmates for privacy in those aspects of their lives in confinement which involve such matters as baths or showers, medical examination and treatment and their psychological security, which is necessary to promote the rehabilitative phases of their confinement, combine to provide a rational basis and a governmental need for limiting contacts in such circumstances to correction officers of the same sex as that of the inmates. Hence the limitation here under attack, established by the administrative action of the Department of Civil Service, and the statute under which it took such action, section 50 (subd. 7) of the Civil Service Law; are constitutional and consistent with the equal protection clause and the provision of the Human Rights Law and the limitation is a valid occupational qualification under section 296 (subd. 1, par [d]) of that law (see Reed v Reed, 404 US 71; Rowe v Colgate-Palmolive Co., 416 F2d 711; Matter of Button v Rockefeller, 76 Misc 2d 701; City of Philadelphia v Pennsylvania Human Relations Commission, 7 Pa Cmwlth 500).

CAREY v NYS HUMAN RIGHTS APPEAL BD. Cont.

The record of the proceedings before the Division of Human Rights and the Human Rights Appeal Board contain sufficient evidence to support the order here under review.

Respondents contend that the issue of the constitutionality of section 50 (subd. 7) of the Civil Service Law may not be raised in a proceeding such as this. Even if this contention were valid, it is well settled that this court, under CPLR 103 (subd. [c]), may treat that aspect of the petition as an action for a declaratory judgment and decide the question (see Matter of Bott v Board of Educ., Deposit Cent. School Dist., 51 AD2d 81, 83).

Petitioner also seeks in his brief to raise an issue as to whether the board's order subjects him to discrimination in employment because of his age in violation of the provisions of subdivisions 1 and 3-a of section 296 of the Executive Law. He argues that although he was past the maximum age of eligibility for employment as a correction officer (male), 37 years, at the time he applied for the examination for correction officer (female), he was not past the maximum age of eligibility for employment as a correction officer (female), which is 46 years. Therefore, his exclusion from the examination for the latter position resulted in his being totally barred, on account of his age, from the position of correction officer. This issue is not properly before us, however, since section 298 of the Executive Law, which governs judicial review of orders of the Human Rights Appeal Board, provides: "No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Here, the petitioner failed to raise the issue of age discrimination in his complaint and has not come forward with any claims of extraordinary circumstances to excuse his failure.

SUOZZI, J.P., GULOTTA, MARGETT and HAWKINS, JJ., concur.

COURT OF APPEALS OF THE STATE OF NEW YORK

----------X

ROBERT CAREY,

Appellant,

-against-

NEW YORK STATE HUMAN RIGHTS APPEAL BOARD, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

----------X

NOTICE OF APPEAL

Index No. 199-E

SIRS:

PLEASE TAKE NOTICE, that ROBERT CAREY, the appellant above named hereby appeals to the Supreme Court of the United States from the final judgment of the New York Court of Appeals entered on April 5, 1979, affirming the Appellate Division Second Department decision that affirmed an order of the New York State Human Rights Appeal Board dismissing appellant's complaint charging the New York State Department of Civil Service with an unlawful discriminatory practice relating to employment practices and that Civil Service Law Section 50 (7) and Executive Law Section 296 (1) (d) of the Laws of the State of New York do not contravene the provisions of the Fourteenth Amendment to the Federal Constitution and dismissing the appellant's complaint and confirming the order of the New York State Human Rights Appeal Board, and from each and every part of the order and of the whole thereof.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Dated: April 26, 1979

YOURS, etc.

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TO:

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Appeal Board

CLERK OF COURT OF APPEALS
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Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11201

Supreme Court, U. S.
FILED
SEP 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5103

ROBERT CAREY,

Appellant,

against

NEW YORK STATE HUMAN RIGHTS APPEAL BOARD, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF APPELLEES NEW YORK STATE HUMAN RIGHTS APPEAL BOARD AND NEW YORK STATE DEPARTMENT OF CIVIL SERVICE TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5103

ROBERT CAREY,

Appellant,

against

NEW YORK STATE HUMAN RIGHTS APPEAL BOARD, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF APPELLEES NEW YORK STATE HUMAN RIGHTS APPEAL BOARD AND NEW YORK STATE DEPARTMENT OF CIVIL SERVICE TO DISMISS OR AFFIRM

Appellees New York State Human Rights Appeal Board ("Appeal Board") and New York State Department of Civil Service ("Department") move pursuant to Rule 16 of the Rules of this Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Court of Appeals of the State of New York on the ground that it presents no substantial federal question.

Opinions Below

The opinion of the Court of Appeals of the State of New York, dated April 5, 1979, is officially reported at 46 N Y 2d 1068. The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department is reported at 61 A D 2d 804. These opinions are included in the Appendix to appellant's Jurisdictional Statement as Exhibits D and C respectively.

Counterstatement of the Case

The State of New York has consistently taken the position that it may reasonably and rationally establish guidelines for sex as a bona fide occupational qualification ("bfoq") as an exception to laws against discrimination. The guidelines created by New York State Civil Service Law ("CSL") § 50.7, challenged herein, state that the Department may limit eligibility for a civil service examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex.

Appellant Carey, a 37 year old male, filed an application for a New York State Civil Service examination given in November, 1975 for the position of Correctional Officer (female), No. 24-330 for which the maximum age limit was 46 years. Appellant's application was disapproved for failure to meet the sex requirement for the job title. There had been an examination given in January, 1975 for Correctional Officer (male) for which the maximum age limit was 37 years.* In 1976, the New York State Department

* The Department establishes the requirements and determines eligibility for the examination of correctional officer but the New York State Department of Corrections administers the examination for the job of correctional officer. The New York State Department of Corrections is not a party herein.

of Corrections administered an examination for Correctional Officer for which all men and women who had not yet reached the age of 37 were eligible. Therefore, the exclusion on the basis of appellant's sex from the November examination resulted in his being totally barred on account of his age, from the position of Correctional Officer. However, appellant does not allege age discrimination as a basis for this appeal.*

Appellant contends the disapproval of his application constituted sex discrimination, thus denying him equal protection of the laws, on two grounds:

1. That CSL § 50(7) is violative of the Fourteenth Amendment of the United States Constitution; and

2. That the classification by sex for the job of correctional officer (female) was not a bfoq and the Department's disapproval of appellant's application for that job was violative of the Fourteenth Amendment of the United States Constitution.

The appellee Appeal Board affirmed the order issued by the New York State Division of Human Rights ("Division") dismissing appellant Carey's complaint against the Department. The Division held that the Department's action did not violate the New York State Human Rights Law ("HRL"). The order was based on findings that CSL § 50.7 correctly permitted the Department to limit eligibility for the examination of Correctional Officer (female) to women if it determined that sex was a bfoq. The order was further based on the Division's findings that

* The Courts below properly refused to entertain the claim of age discrimination raised for the first time by the appellant in his brief submitted to the Appellate Division. The Appellate Division held and the Court of Appeals unanimously affirmed that the claim was not properly before it since appellant had failed to raise it below and had also failed to come forward with any claims of extraordinary circumstances to excuse his failure as required by the Executive Law § 298. [See also, *Matter of Mize* v. *State Division of Human Rights,* 33 N.Y.S.2d 53 (1973); *Matter of Selian* v. *Kelly,* 3 A.D. 2d 669 (2nd Dept. 1957).]

separate announcements were used for each sex to facilitate job analysis, recruitment relative to differing needs in male or female correctional institutions and administration of eligibility lists and appointments and that an examination for correctional officer (male) had been held in January 1975 in the region in which appellant resides.

The Supreme Court of the State of New York, Appellate Division, Second Department found that:

> "The limitation here under attack, established by the administrative action of the Department of Civil Service, and the statute under which it took such action, Section 50 (subd. 7) of the Civil Service Law, are constitutional and consistent with the equal protection clause and the provision of the Human Rights Law and the limitation is a valid occupational qualification under Section 296 (subd. 1), par. [d] of that law. (See *Reed* v. *Reed,* 404 U.S. 71; *Bowe* v. *Colgate-Palmolive Co.,* 416 F. 2d 711; *Matter of Button* v. *Rockefeller,* 76 Misc. 2d 701; *City of Philadelphia* v. *Pennsylvania Human Relations Commission,* 7 Pa. Cnwlth 500)."

The New York State Court of Appeals unanimously affirmed.

ARGUMENT

It is well settled law that there is a strong presumption that a statute duly enacted by the Legislature is constitutional, *Brown* v. *Wichita State University,* 547 P. 2d 1015, app. dsmd. 429 U.S. 806 (1976); *McGowan* v. *State of Md.,* 366 U.S. 420 (1961); *State* v. *Solomon,* 141 SE 2d 818 (Sup. Ct. S. Cal.), app. dsmd. 382 U.S. 204 (1965); *Montgomery* v. *Daniels,* 38 N Y 2d 41, 54 (1975); *Taylor* v. *Sise,* 33 N Y 2d 357 (1975), and that it is the obligation of courts, if possible, to read the statutes so as to preserve their constitutionality. *Rogoff* v. *Anderson,* 34 A D 2d 154 (1970), affd. 28 N Y 2d 880, app. dsmd. 404 U.S. 805

(1971); *People* v. *Harper,* 136 NW 2d 768 (Ct. of App., Mich. 1965), affd. 152 NW 2d 645 (1967), app. dsmd. sub nom. *Harper* v. *Mich.,* 392 U.S. 644 (1968); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 312 F. Supp. 503 (D.N.C. 1970), affd. 402 U.S. 43, reh. den. 403 U.S. 912 (1971).

Appellant contends that the statute is unconstitutional on its face because it permits a classification by sex in violation of the Equal Protection Clause of the Fourteenth Amendment. The appropriate standard to be applied to determine whether the sex-based classifications permitted by CSL § 50(7) are violative of the Equal Protection Clause of the Fourteenth Amendment is the "rational" and "substantial relationship" test: Do the classifications by sex permitted by CSL § 50(7) bear a rational substantial relationship to an important state objective that is sought to be advanced by the operation of these statutory provisions? *Califano* v. *Webster,* 434 U.S. 313 (1977); *Kahn* v. *Shevin,* 416 U.S. 351 (1971); *Reed* v. *Reed,* 414 U.S. 71 (1971); *Royster Guano Co.* v. *Virginia,* 253 U.S. 413, 415 (1920); *National Organization for Women* v. *Goodman,* 374 F. Supp. 247 (S.D.N.Y. 1974); *Matter of Patricia A.* v. *City of New York,* 31 N Y 2d 83, 88 (1972).*

Clearly on its face, the statute bears a rational and substantial relationship to a state objective sought to be advanced by it. Establishing a guideline for bfoq is a well-established, rational government objective. As appellant has pointed out in his brief, provisions for a bfoq as an exception to the law against discrimination are articulated in both the HRL § 296(1)(d) as well as in the guidelines of the Equal Employment Opportunity Commission, *Guide-*

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* While there is a body of opinion holding that a gender-based legislative classification must be subjected to close judicial scrutiny and when challenged can be sustained only if the state demonstrates that it serves a compelling state interest, e.g., Justice Brennan's dissent in *Kahn* v. *Shevin, supra* at 357; this strict scrutiny test has *not* yet been adopted or applied by a majority of this Court.

lines for Discrimination Because of Sex, 129 C.F.R. § 1604.1 (a)(2) (1976). We agree, too, with appellant that CSL § 50.7 is a restatement of HRL § 296(1)(d) and that in substance its sole purpose is to grant the Department discretion to limit eligibility for some examinations on the basis of sex if there is a bfoq. Therefore, it cannot be said that where such discretion is exercised, a violation of equal protection would necessarily occur.

It has been held that bfoq's are valid if certain standards are met. *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977); *Bowe* v. *Colgate Palmolive Co.,* 416 F. 2d 711 (7th Cir. 1969). Physical capabilities, psychological make-up, and climatic conditions should be considered in deciding whether a bfoq is valid, *id.* at 718. A bfoq may also be valid if sexual status is reasonably related to job performance. *Button* v. *Rockefeller,* 76 Misc 2d 701 (N.Y. Sup. Ct. Albany Co. 1973).

In the case at bar, at the time appellant's application was rejected,* the general belief was, that a male correctional officer in a female prison would cause great physical

* Appellant assumes that since the current examination for correctional officer is unisex, the appellees cannot logically or legally argue that at the time appellant applied there was a bfoq. This assumption is erroneous for two reasons. First, the fact that a bfoq exists does not mean that an employer is bound to hire only persons of one sex; it means, however, that if he does, it is not illegal discrimination. (The Department may determine at some future time that it is once again necessary to employ sex as a bfoq. In fact, the Department has already been ordered to restore sex as a bfoq at least with regard to selective work responsibilities of correctional officers. *Forts* v. *Ward,* 434 F. Supp. 946 [S.D.N.Y. 1977], rev. o.g. 566 F. 2d 849 [2d Cir. 1977], on remand slip. op. Docket No. 77 Civ. 1560, November 20, 1978.) Second, December 1975 is the point in time at which the alleged discriminatory act occurred and therefore the rules, regulations and procedures of the Department in effect at that time are the only ones which may be considered relevant in considering the determination of the Appeal Board.

and psychological conflicts among the inmates that a female would not cause. A correctional officer's job requires supervision of all activities and conduct of inmates, often under intimate circumstances, counseling of inmates, and resolving problems and conflicts. These duties require a physical and psychological compatibility with female inmates which a male officer might lack. The necessity to reduce alienation between the correctional officers and the inmates would further be strained by frequent exposure between inmates and officers of the opposite sex. This has been recognized by this Court which has upheld sex as a bfoq in the selection of prison guards under Title VII of the Civil Rights of 1964, *Dothard* v. *Rawlinson* (*supra*).

Furthermore, the inmates' rights should be taken into consideration when the bfoq is scrutinized. As the Appellate Division below emphasized:

> "We are here concerned with persons who are serving terms of imprisonment in correctional facilities in which they are segregated by sex and must be confined under observation and guard at all times; both the needs of the correctional facilities to maintain security by such means as body searches and the needs of the inmates for confinement which involve such matters as baths or showers, medical examination and treatment and their psychological security, which is necessary to promote the rehabilitative phases of their confinement, combined to provide a rational basis and a governmental need for limiting contacts in such circumstances to correction officers of the same sex as that of the inmates."

The lack of dignity and self-respect prisoners feel in general must be reduced as much as possible in order to successfully rehabilitate them. The Department recognized at the time that it was desirable to appoint correctional officers by sex in order to afford the inmates a limited amount of privacy. There can be little doubt that there is

a constitutional right to privacy which is fundamental. *Carey* v. *Population Services Int'l.*, 431 U.S. 678 (1977). Such a right extends to inmates. *In re Long*, 127 Cal. Rptr. 732, 736-737 (Cal. Ct. App. 1976); *Forts* v. *Ward*, *supra*.

In light of the foregoing, CSL § 50(7) is constitutional, the sex classification for the job in question is legal and there has been no denial of equal protection. This appeal, therefore, presents no substantial federal question for this Court's determination and should be dismissed.

CONCLUSION

This appeal should be dismissed, or in the alternative, the decision of the New York State Court of Appeals should be affirmed in all respects.

Dated: New York, New York
September 7, 1979

Respectfully submitted,

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